

# Vaccine Litigation Update

*ImmunizeVA Coalition Meeting*

August 2024

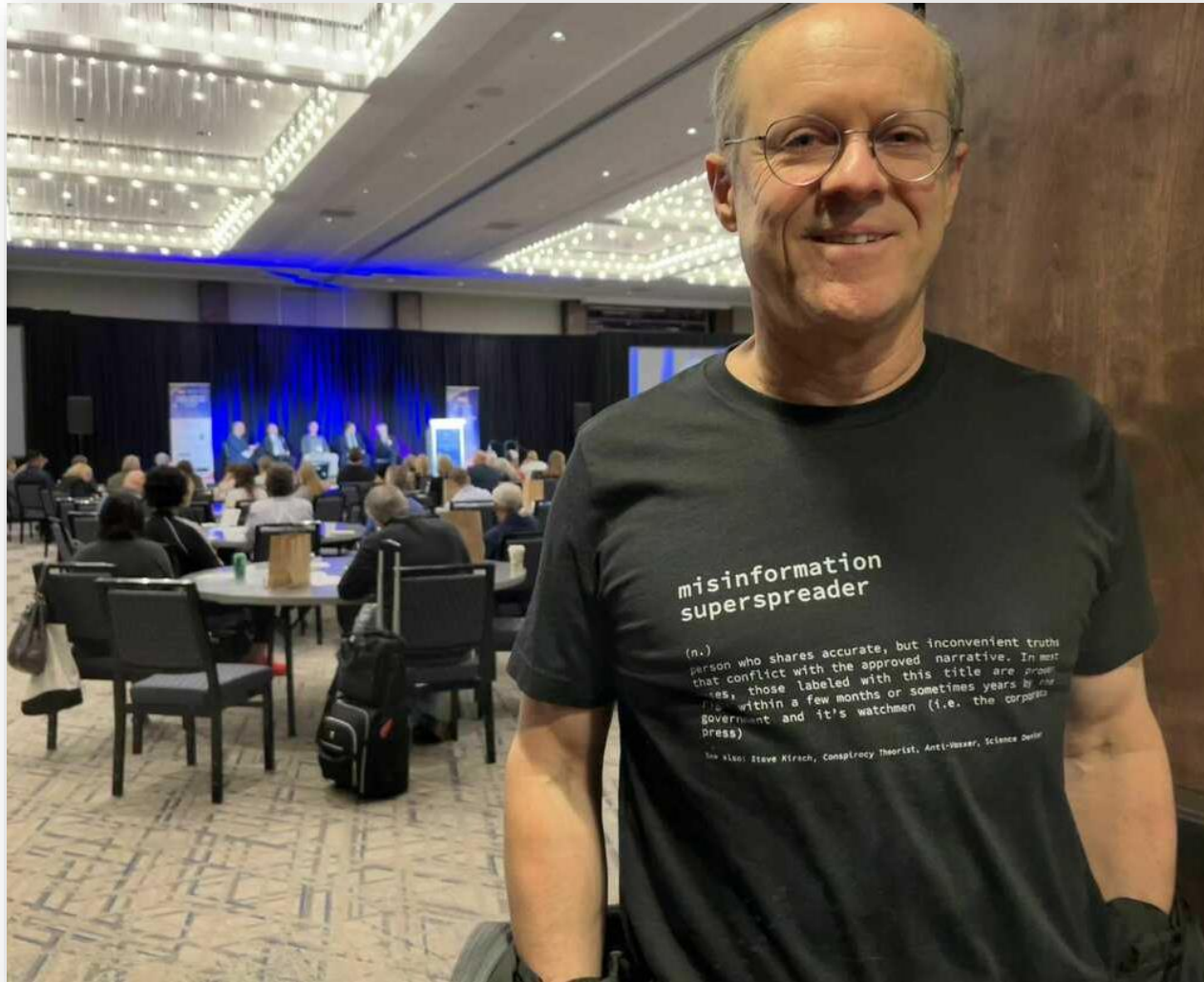
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# Anti-Vaccine Advocates Have Entered the Courts



## Manufacturers are a target

"Their proposed targets include hospitals, school systems, medical licensing boards and, **the holy grail, pharmaceutical companies that make vaccines.**"

**A major benefactor and organizer stated, "My goal is to expose every single one of these a\*\*holes" and was met with "uproarious applause."**

# **The New Frontier: The COVID-19 Pandemic Has Resulted in an Unprecedented Influx in Vaccine Related Litigation**

**Lawsuits over military vaccine mandate to continue despite DOD rescinding it**

**Lawsuits still piling up over hospital vaccine mandates**

**Blue Cross faces flurry of new lawsuits over vaccine mandate**

**NY vaccine mandate for healthcare workers 'null, void' following judge ruling**

**Challenges Against Employer COVID-19 Vaccine Mandates Show No Sign of Slowing**



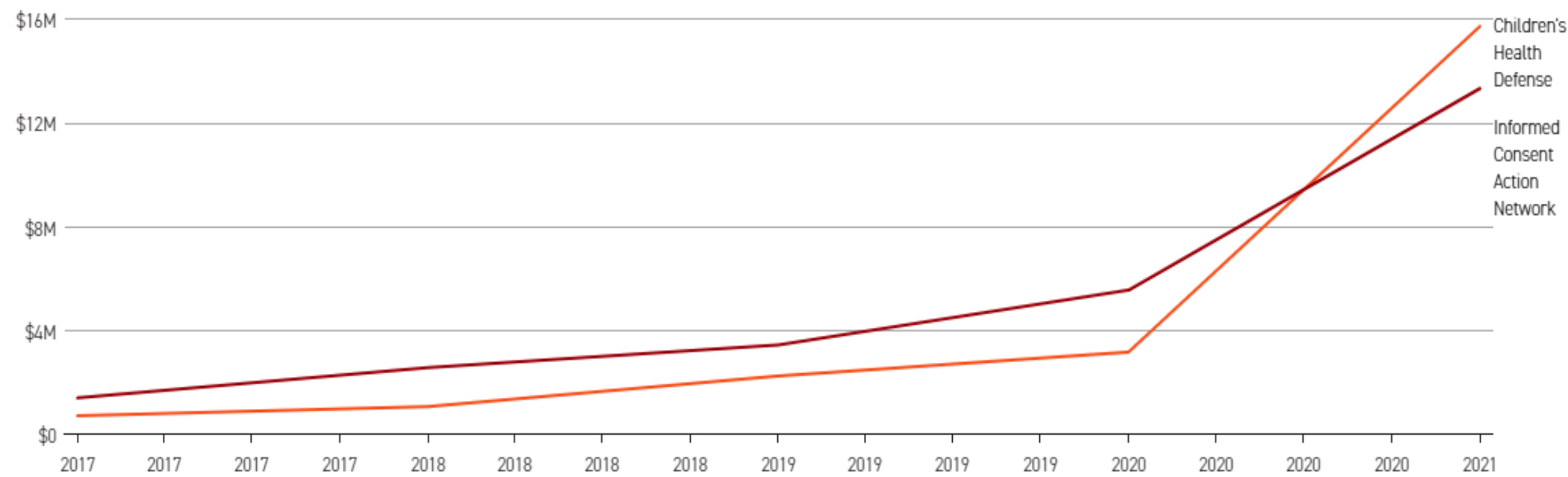
“Del Bigtree said Informed Consent Action Network had been able to hire more lawyers and scientists, with its staff more than doubling compared to pre-pandemic levels.”

Politico, Anti-vaxxers are now a modern political force (September 24, 2023), <https://www.politico.com/news/2023/09/24/anti-vaxxers-political-power-00116527>



# Anti-Vaccine Nonprofits Saw Revenues Spike During the COVID-19 Pandemic

Total revenues for Children's Health Defense and the Informed Consent Action Network from 2017-2021



Source: POLITICO analysis of nonprofit tax filings  
Jessica Piper/POLITICO

# Anti-Vaccine Litigants Have Clear Objectives

- **Following the model that led to *Dobbs***

- "And I think like we saw with *Roe v Wade*, you had a case that was passed 50 years ago and then had various chips away at it until the ground crumbled"

- **"Winning" even if not on legal grounds**

- "Cases don't even have to succeed in court to have an impact . . . Influencers and headlines can frame settlements, technical legal outcomes or compelling, emotional testimony as victories for one side or another"

- **Taking advantage of SCOTUS focus**

- "She said these lawsuits also come at a time when the Supreme Court is weakening the powers of many regulators."

- **Leveraging COVID fatigue and frustration**

- "keeping COVID-related grievances alive in the courts may also help sustain the larger movement against vaccines"

# The Supreme Court May Soon Revisit Historic Public Health Law Precedents

## 1905: *Jacobson v. Massachusetts*

- Held that compulsory vaccination is a reasonable exercise of the state police power.

## 1922: *Zucht v. King*

- Affirmed that vaccination requirements are constitutional if they are reasonably related to the state's interest in preventing the spread of contagious diseases within schools.
- Reinforced Jacobson's application in a non-outbreak, school-based application for purposes of suppressing an endemic disease.

**In light of Supreme Court decisions during the COVID-19 pandemic, the 9<sup>th</sup> Circuit decision in *Health Freedom Defense Fund v. Carvalho*, and the rejected cert. in *Norris, et al. v. Stanley, et al.*, we may soon see a case where the Supreme Court turns back the clock on over 120 years of public health law**

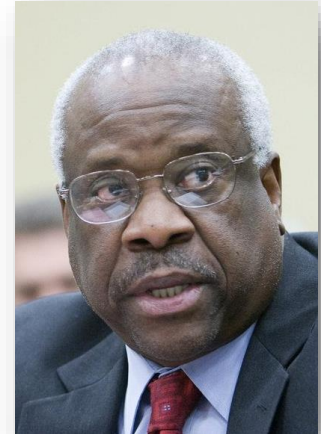


# Vaccine Mandates at SCOTUS After A Century Hiatus



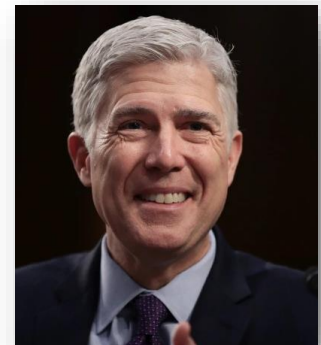
"Three Courts of Appeals and one State Supreme Court agree that such requirements are not neutral or generally applicable and therefore trigger strict scrutiny."

- Justice Clarence Thomas (dissenting opinion, *Dr. A. v. Hochul*, re: health care work vaccination requirements)



"Slice it how you will, medical exemptions and religious exemptions are on comparable footing when it comes to state asserted interests."

- Justice Neil Gorsuch (dissenting opinion, *Does v. Mills*)



# Vaccine Litigation Undermines Public Health Authority, Vaccine Confidence

**Some decisions have misconstrued vaccine evidence, delivering fodder for vaccine disinformationists**

“It is clear such expertise was not utilized as the COVID-19 shots do not prevent transmission”

– Judge Gerard Neri, New York State Supreme Court, Onondaga County



**Recent judicial decisions equate disease transmission with lack of vaccine effectiveness and equate vaccination policies with forced medical treatments**

“At this stage, we must accept Plaintiffs’ allegations that the vaccine does not prevent the spread of COVID-19 as true. [...] And, because of this, *Jacobson* does not apply.”

– Judge Ryan Nelson (opinion, Health Freedom Defense Fund, Inc. v. Alberto Carvalho)



“[C]ompulsory treatment for the health benefit of the person treated — as opposed to compulsory treatment for the health benefit of others — implicates the fundamental right to refuse medical treatment.”

– Judge Daniel Collins (concurring opinion, Health Freedom Defense Fund, Inc. v. Alberto Carvalho)

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## ***Braidwood v Becerra***

# The Affordable Care Act Requires Preventive Coverage

Certain evidence-based recommendations must be covered without cost sharing by private health plans and Medicaid expansion programs

**Advisory Committee on  
Immunization Practices**



**Recommended Immunizations**

**United States  
Preventive Services Task Force**



**Recommended Disease Screenings and  
Products Such as PrEP for HIV, Statins**

**Health Resources  
and Services Administration**



**Women's Services,  
Such as Contraceptives**

**The *Braidwood* decision may impact preventive coverage for over 150M Americans with private insurance, nearly 23M with Medicaid expansion coverage**

# ACIP Has Also Been a Focus of Courts

## Plaintiffs in *Braidwood v. Becerra* targeted the HPV vaccine among other preventive services

“They say neither they nor their families require such preventive care. They also claim that compulsory coverage for those services violates their religious beliefs by making them complicit in facilitating homosexual behavior, drug use, and sexual activity outside of marriage between one man and one woman.” - Judge Reed O'Connor (describing plaintiffs' claims)



**The fate of guaranteed coverage for evidence-based preventive services remains in question as *Braidwood* returns to district court to address outstanding issues.**

The Fifth Circuit sided with the District Court in part, finding that the structure of the USPSTF under the ACA is unconstitutional. The Fifth Circuit declined to determine the constitutionality of ACIP and HRSA requirements, returning this question back to the District Court.

**The preventive services mandate generally remains intact pending resolution of the case, but further appeals may bring it before the Supreme Court.**

# Additional Strategies Required to Effectively Address Vaccine Hesitancy

## Current Approach to Vaccine Hesitancy

- Monitoring anti-vaccine legislation
- Organizing advocates “behind the scenes”
- Targeted state legislative advocacy
- Studying hesitancy, its causes and effects
- Provider education
- Patient and consumer literacy

## Additional Approaches Needed

- Monitoring vaccine related litigation
- Assess cases and threat level, including industry and public confidence impact
- Develop and deliver counter narratives through
  - *Amicus* briefs
  - Social media and other strategies